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No. 92-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON,

Petitioners,

v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The Order of the Seventh Circuit Court of Appeals denying rehearing is reported at 962 F.2d 655 (May 6, 1992), not in volume 965 as stated in the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Section 1254 of the Judicial Code, 28 U.S.C. § 1254, provides:

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

Section 402(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1102(a)(1), provides in relevant part:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument.

COUNTER-STATEMENT OF THE CASE

This is a class action brought pursuant to section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), and section 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), seeking to require Respondents to provide Petitioners with free life insurance and medical benefits for the rest of their lives. Pet. App. 10a-11a. Petitioners base their claim on welfare benefit plans negotiated as part of collective bargaining agreements between their collective bargaining representative, the United Steelworkers of America ("the Steelworkers Union"), and Respondent PST, Inc.[1] Five collective bargaining agreements (CBAs),

[1] Respondent United Dominion Industries, Inc. is a publicly held corporation traded on the New York, Montreal and Toronto Stock Exchanges. Respondent PST, Inc. became a subsidiary of United Dominion Industries, Inc. in 1982, and still is. Pet. App. 6a. Respondent Pressed Steel Tank Co., Inc. is a privately-held cor-

(Footnote continued on following page)

seven insurance plan books or summary plan descriptions (SPDs), and two welfare benefit plans (1975-84 and 1984-88) are involved in this case. Pet. App. 2a-9a; Plaintiffs' Trial Exhibits Nos. 1-11, 13.

Petitioners leave out the most important provisions of the collective bargaining agreements: the expiration and integration clauses. The 1975 agreement provided:

> 25.2 Scope of Agreement. This Agreement and the supplemental letter agreements executed concurrently herewith constitute the sole and entire Agreement between the parties and supersedes all prior Agreements, oral or written, and expresses all the obligations of or restrictions imposed on the respective parties during its term. Such Agreement can only be amended by a signed agreement executed by the parties. Such agreement shall be published and made available to employees.
>
> SECTION 26
> DURATION OF AGREEMENT
>
> 26.1 This Agreement shall remain in full force and effect until midnight, July 31, 1978 . . . .

Pet. App. 2a-3a; Pl. Ex. 1, p. 43. Each of the next four collective bargaining agreements contained identical integration and expiration clauses, as sections 25.2 and 26.1 of each agreement—identical, save that they expired on July 31 of 1981, 1984, 1986, and 1988, respectively. Pet. App. 3a-9a; Pl. Exs. 2-5.

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[1] *continued*

poration with no parent or subsidiary corporations. The statement in the Petition (page 3, fn. 1) that Pressed Steel Tank purchased PST from United Dominion in 1987 (or at any other time) is incorrect. Pressed Steel Tank bought only PST's assets, including the name "Pressed Steel Tank Company." Pet. App. 2a.

Nothing in any of the five contracts or seven insurance books or SPDs prescribed a durational period for welfare benefits different from the July 31 expiration date fixed by § 26.1 of each agreement. No provision for vesting, nonforfeitability, or lifetime duration of welfare benefits appeared anywhere in any labor contract, benefit book, summary plan description, or other document, either before or after 1984. Pet. App. 19a-20a, 55a; Pl. Exs. 1-11, 13.

The Petition incorrectly states that there was trial testimony that PST representatives had stated that benefits would be for life. The actual testimony was that each Petitioner assumed benefits would be for life, and nobody told him otherwise, and that was the basis of their claim—nothing in writing, no discussion or agreement, and no oral representation of lifetime welfare benefits.[2] Tr. 149-150, 224, 231-232, 254-256, 277-278, 281-282.

The language of pre-1984 contracts is largely irrelevant because the old benefit plan was terminated by the 1984 labor agreement, and replaced by a new benefit plan. Pet. App. 6a. No pre-1984 retiree sued under ERISA to restore the old plan. Instead, all retirees transferred willingly into the new benefit plan. And the relief sought by Petitioners in this case, and granted by the District Court, is the restoration of the 1984-1988 benefit plan at the 1984-86 benefit levels, the highest level of benefits ever provided. Pet. App. 37a-38a. Petitioners wanted to turn back time to 1985, but no farther, because the level of benefits changed with every new contract: from a low benefit of a $3.90 contribution by the Company per month

[2] Except by a single person, not a class representative, who conceded on cross-examination he was told that about pension benefits. Tr. 176, 185.

under the 1975 agreement, increased in the 1978 and 1981 agreements, then a new plan with a choice of providers under the 1984 agreement—including full payment of premiums for four health maintenance organizations (HMOs)—but decreased benefits, with a cap on reimbursement for HMO premiums, under the 1986 agreement. Pet. App. 40a-55a. Thus only the terms of the 1984-88 benefit plan are pertinent to the Petition to this Court.

The 1984 collective bargaining agreement contained no reference to retiree welfare benefits at all; those were mentioned only in the summary plan description. Pet. App. 20a. The 1986 contract specifically tied the duration of retiree welfare benefits to the duration of the basic labor agreement:

> Group medical and life coverages and Medicare Part B reimbursement for (a) current retirees and (b) employees who retire during the current contract shall be continued during the term of this Agreement.

Pet. App. 6a.

The April 1985 and December 1986 summary plan descriptions, issued under the 1984 and 1986 contracts, specifically provided:

> TERMINATION OF BENEFITS
>
> The benefits provided directly by Pressed Steel Tank Company will terminate on the earliest of the following dates . . . :
>
> (a) the date the plan is terminated; . . .
>
> (j) upon expiration of the labor agreement unless extended, modified or amended in the case of employees (active or inactive) and retirees;
>
> * * *
>
> The right is reserved in the plan for the plan sponsor to terminate, suspend, withdraw, amend or modify

> the plan in whole or in part at any time, subject to the applicable provisions of the plan.

Pet. App. 7a-8a.

The District Court submitted this case to a jury. Pet. App. 12a. The jury never read any of the contracts, insurance booklets or other documents—never took them back to the jury room—and reached a verdict for Plaintiffs in 20 minutes. Pet. App. 13a; R. 82, Tr. 101, 103. On September 10, 1990 the District Court issued an Injunction which required Respondents to provide the Petitioners with the life insurance and medical benefits provided immediately prior to July 31, 1988—but at the highest, 1984-86 levels for pre-July 1, 1986 retirees. Pet. App. 37a-38a.[3]

Jack Hudson died in 1990 and is not really a Petitioner in this case.

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[3] Neither the Petitioners nor the District Court ever articulated any rationale for giving retirees during the 1975, 1978, and 1981 agreements a vested right to the higher benefits provided by the successor benefit plan between 1984 and 1986, Pet. App. 27a-36a, and that question was neither argued nor submitted to the jury. Pet. App. 63a-67a. The Court of Appeals did not address this issue because it determined that none of the collective bargaining agreements provided any retiree with any vested right to benefits at all, let alone at any particular level. Pet. App. 21a-22a.

REASONS THE WRIT SHOULD BE DENIED

I.

THIS COURT LACKS CERTIORARI JURISDICTION OF THIS CASE BECAUSE THE CASE WAS NOT "IN THE COURT OF APPEALS" WHEN THE PETITION WAS FILED.

This Court's certiorari jurisdiction extends only to "Cases in the courts of appeals." 28 U.S.C. § 1254. A case is "in" the court of appeals and within this Court's certiorari jurisdiction if the case is both on the court of appeals's docket and properly within that court's jurisdiction on the day and at the time the petition for writ of certiorari is filed. *United States v. Nixon*, 418 U.S. 683, 689-690, 94 S. Ct. 3090, 3098 (1974) (petition filed same day, but hours after, case docketed in court of appeals).

This case was not "in" the Court of Appeals on August 3, 1992, when the Petition was filed, because the Court of Appeals issued its mandate on May 13, 1992. Resp. App. 1b-2b. Issuance of the mandate formally ends appellate court jurisdiction. Jurisdiction then returns to the tribunal to which the mandate is directed, for such proceedings as may be appropriate—the District Court in this case. *Sgaraglino v. State Farm Fire & Cas. Co.*, 896 F.2d 420, 421 (9th Cir. 1990); *Johnson v. Bechtel Assoc. Professional Corp.*, 255 U.S. App. D.C. 198, 801 F.2d 412, 415 (D.C. Cir. 1986); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978).

The Federal Rules of Appellate Procedure recognize the mandate's effect on this Court's certiorari jurisdiction: Rule 41(b) allows the court of appeals to grant "A stay of the mandate pending application to the Supreme Court for a writ of certiorari," upon motion and notice. Petitioners, however, chose not to seek a stay and the man-

date issued on May 13, 1992, returning the case and the record to the District Court. Resp. App. 1b.

Petitioners have filed a Supplemental Brief in this Court, alleging that Petitioners have sought recall of the Seventh Circuit's mandate due to its action in another case in that Court. Recall of that Court's mandate would not restore jurisdiction to this Court, however, because whether a case is "in" the Court of Appeals is determined as of the date and hour the petition is filed. *United States v. Nixon*, 418 U.S. at 689-690, 94 S. Ct. at 3098.

This Court therefore lacks jurisdiction of this case, and the Petition must be denied.

II.

THERE IS NO CONFLICT BETWEEN CIRCUITS: THE "DEFAULT RULE" FOLLOWED BY THE COURT OF APPEALS IS THE TRADITIONAL BURDEN-OF-PROOF RULE FOLLOWED IN EVERY CIRCUIT, EVERY STATE, AND THIS COURT.

1. The "default rule" followed by the Court of Appeals is the traditional contract analysis.

The conflict between circuits cobbled up by Petitioners is largely imaginary.

The Petition assails the "default rule" followed by the Seventh Circuit Court of Appeals in this case: the traditional rule that entitlements established by collective bargaining agreements do not survive their expiration or modification. *Senn v. United Dominion Industries, Inc.*, Pet. App. 21a, 951 F.2d 806, 816, *reh'g denied en banc*, 962 F.2d 655 (7th Cir. 1992); *Merk v. Jewel Cos.*, 848 F.2d 761, 763 (7th Cir.), *cert. denied*, 488 U.S. 956 (1988). This default rule is not nearly so dire as Petitioners think. Remember what a "default rule" means: it simply denotes

the allocation of the burden of proof. A "default rule" describes what happens when a party who has the burden of proof, or "risk of nonpersuasion," F.R.E. 301, fails to carry it. There is nothing remarkable or controversial about making a plaintiff bear the burden of proof that a particular promise is included within the parties' contract. That is the "default rule" in every circuit and in every state.

No Circuit shifts the burden of proof to the defendant employer, to prove an express agreement that retiree health benefits do *not* vest. Yet such a presumption is exactly what Petitioners advocated in the courts below, Pet. App. 55a-59a, and what they need to prevail in this case.

The Court of Appeals did not state any new rule in this case. All the court did was follow the traditional method of contract analysis. Traditional rules of contract interpretation apply to collective bargaining agreements generally, and to retiree welfare benefits cases in particular, as long as their application is consistent with federal labor policies. *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 931 (10th Cir. 1992) (citing *Senn* for this proposition); *United Paperworkers v. Champion Int'l Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 600 (7th Cir. 1989); *Anderson v. Alpha Portland Industries, Inc.* ("*Anderson II*"), 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). The court must start with the language of the contract. *Anderson II*, 836 F.2d at 1517. The contract must be looked at as an integrated whole, with every provision given meaning and none rendered nugatory. *Ryan*, 877 F.2d at 604; *Yard-Man*, 716 F.2d at 1479-80. If the contract is not am-

biguous, then the court must interpret the contract as a matter of law. *Awbrey*, 961 F.2d at 931; *Senn*, Pet. App. 18a, 951 F.2d at 815; *Champion Int'l*, 908 F.2d at 1256; *Ryan*, 877 F.2d at 602. A contract is "ambiguous" only if it is reasonably susceptible of more than one meaning. *Champion Int'l*, 908 F.2d at 1256. Whether a contract is ambiguous is a question of law, which must be determined by looking within the four corners of the agreement. *Senn*, Pet. App. 18a, 951 F.2d at 806; *Champion Int'l*, 908 F.2d at 1256; *Ryan*, 877 F.2d at 602. Then, if the contract is ambiguous, and only then, the determination of the agreement of the parties becomes an issue of fact, and extrinsic evidence may be admitted to interpret (but not to vary) the ambiguous term of the contract. *Awbrey*, 961 F.2d at 931; *Senn*, Pet. App. 18a-19a, 951 F.2d at 806; *Champion Int'l*, 908 F.2d at 1256; *Anderson II*, 836 F.2d at 1517.

The proposition that contractual obligations terminate when a contract expires is self-evident: that is what expiration clauses are for. *Consolidated Bearings Co. v. Ehret-Krohn Corp.*, 913 F.2d 1224, 1230 (7th Cir. 1990) (common-law contract under Illinois law); *Penthouse Int'l, Ltd. v. Dominion Federal S. & L. Ass'n*, 855 F.2d 963, 975-976 (2d Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989) (common-law contract under New Jersey law); *Clark v. Ryan*, 818 F.2d 1102, 1106 (4th Cir. 1987) (collective bargaining agreement). When the contract does not prescribe an express durational provision, it is construed as terminable at will, not as continuing forever. *All Line, Inc. v. Rabar Corp.*, 919 F.2d 475, 479 (7th Cir. 1990) (contract under Illinois law); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1012 (7th Cir. 1985) (Illinois law); *Moorehouse v. Boeing Co.*, 501 F. Supp. 390, 395 (E.D. Pa.), *aff'd mem.*, 639 F.2d 774

(3d Cir. 1980) (Pennsylvania law); *Miller v. Wikel Mfg. Co.*, 46 Ohio St. 2d 76, 545 N.E.2d 76, 79 (1989). A contract will not be construed as providing a perpetual or unlimited contract right unless the contract clearly states that that is the intent of the parties. *William B. Tanner Co. v. Sparta-Tomah Broadcasting Co.*, 716 F.2d 1155, 1159 (7th Cir. 1983) (Wisconsin law); *Town of Readsboro v. Hoosac Tunnel & W.R. Co.*, 6 F.2d 733, 735 (2d Cir. 1925) (Learned Hand, J.) (pre-1938 case arising in Vermont, applying national common law, relying on Massachusetts and Sixth Circuit precedents); *United States Surgical Corp. v. Oregon Medical & Surgical Specialties, Inc.*, 497 F. Supp. 68, 71 (S.D.N.Y. 1980) (New York law); *Boyle v. Reader's Subscription Inc.*, 481 F. Supp. 156, 158 (S.D.N.Y.), *aff'd mem.*, 614 F.2d 1285 (2d Cir. 1979) (New York law); *Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655, 661 & n.5 (S.D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960) (New York and Missouri law follow same rule); *Shannon v. Civil Service Empl. Ins. Union*, 169 Cal. App. 2d 79, 337 P.2d 136, 138 (1959).

In this case, the Court of Appeals followed the traditional analysis, but did not have to follow it very far. The Court looked at the language of the agreements, Pet. App. 19a-20a; found that the agreements were not ambiguous, Pet. App. 20a; held that extrinsic evidence was neither necessary nor permissible, Pet. App. 21a; and proceeded to interpret the agreements as a matter of law, Pet. App. 21a. The Court determined that, absent any textual indication to the contrary, retiree welfare benefits expired when the contract did. Pet. App. 21a.

This Court recently applied the same "default rule" to determine whether contractual obligations survived the expiration of a collective bargaining agreement, in *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215

(1991). This Court did not consider or decide whether contractual obligations expire when the contract does. It did not have to: that proposition was self-evident and axiomatic, the starting point in the analysis, not the end result. The issue was whether statutory policies required an *exception* to the "default rule" that the entitlements of collective bargaining agreements do not survive their expiration (there, the duty to arbitrate). *Litton Financial*, 111 S. Ct. at 2221-2222. This Court wrote:

> [A]n expired contract has by its terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied.

Litton Financial Printing, 111 S. Ct. at 2225. This Court recognized an exception to that default rule: an obligation would continue after expiration if a right vested during the contract or if, under normal principles of contract interpretation, the contract provision survives expiration of the agreement. *Ibid.* That is the same inquiry performed by the Court of Appeals in this case. Pet. App. 19a-21a.

Every court which has considered the issue, including this Court, has held that there is no *statutory* obligation under ERISA for welfare benefits to vest upon retirement or to extend beyond contract expiration. *Massachusetts v. Morash*, 490 U.S. 107, 119, 109 S. Ct. 1668, 1675 (1985); *Yard-Man*, 716 F.2d at 1482. Welfare benefits vest only as a matter of agreement, or not at all. *Ryan*, 877 F.2d at 602; *Anderson II*, 836 F.2d at 1516; *Yard-Man*, 716 F.2d at 1480.

Thus the "default rule" applied by the Court of Appeals in this case is nothing unusual.

2. Decisions of other circuits in retiree benefits cases.

The analysis and decision of the Court of Appeals in this case follow the same approach taken by all but one of the other circuits in retiree welfare benefits cases (all except the Sixth). Retiree health benefits have come before the Seventh Circuit twice, in this case and in *Ryan*. Both times the Seventh Circuit followed traditional contract principles and placed the burden on the plaintiff retirees to prove an entitlement to benefits. The Eighth Circuit has repeatedly placed the burden of proof on plaintiff retirees; sometimes the plaintiffs win, sometimes they lose, depending on the terms of the agreements. *Anderson II*, 836 F.2d at 1517 (expressly rejecting *Yard-Man* "inference," cited by the Seventh Circuit in *Merk* and in this case); *DeGeare v. Alpha Portland Industries, Inc.*, 837 F.2d 812 (8th Cir. 1988), *vacated on other ground*, 489 U.S. 1049 (1989); *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990). The Fifth Circuit expressly rejected the Sixth Circuit's *Yard-Man* "inference," which Petitioners seek to enlarge, and put the burden on the retiree-plaintiff to prove a right to lifetime benefits. *Champion Int'l*, 908 F.2d at 1261 n.12. The Eleventh Circuit also requires a right to post-retirement benefits to be established by contract, rather than presumed. *Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 675 (1991). Recently the Second Circuit construed plan language virtually identical to that in the 1986 collective bargaining agreement in this case—"Health care benefits are guaranteed during the term of this Agreement"—as requiring continuation of benefits until the end of the agreement, and no longer. *In re Chateaugay Corp.*, 945 F.2d 1205, 1208 (2d Cir. 1991), *cert. denied, sub nom. UMW 1974 Benefit Plan v. LTV Steel Co.*, 112 S. Ct. 1167 (1992). A very recent Tenth Circuit

decision involving retiree health benefits cited *Senn* approvingly for its application of traditional contract principles, and refused to admit extrinsic evidence to alter an unambiguous agreement. *Awbrey*, 961 F.2d at 931. The Fourth Circuit recently approved a unilateral plan amendment which required retirees to contribute a fraction of the cost of their medical benefits. *Pierce v. Security Trust Life Ins. Co.*, No. 90-1101, slip op., ____ F.2d ____ (4th Cir. July 2, 1992). The current trend among the Circuits is uniform and consistent with the Seventh Circuit's approach taken in *Merk*, *Ryan*, and this case.

All of these cases follow the traditional contract analysis, but they are informed by two principles peculiar to ERISA. First, welfare benefits do not vest as a matter of law, but only by agreement, as the result of a deliberate policy choice made by Congress. *Massachusetts v. Morash*, 490 U.S. at 119. Second, Congress enacted a statute of frauds for employee benefit plans:

> Every benefit plan shall be established and maintained pursuant to a written instrument.

ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). Thus welfare benefits do not vest upon retirement as a matter of law, but only as a matter of agreement. *Ryan*, 877 F.2d at 602.

There is a line of cases inconsistent with the majority approach exemplified by *Senn*, but it is a smaller and more irregular line than Petitioners describe—it exists only in the Sixth Circuit, and not always there. Even the Sixth Circuit purports to apply traditional contract principles. *Yard-Man*, 716 F.2d at 1479. But the Sixth Circuit's decision in *Yard-Man* characterized retiree welfare benefits as "status benefits" and posited an "inference" that welfare benefits vest upon retirement, and continue

as long as retirement "status" is maintained. This Sixth Circuit heresy has been criticized and rejected in every other Circuit which has considered it, expressly by the Eighth and Fifth Circuits in *Anderson II* and *Champion Int'l*, and implicitly by the Second, Fourth, Seventh, Tenth and Eleventh Circuits in *In re Chateaugay*, *Pierce*, *Senn* and *Ryan*, *Awbrey*, and *Alday*.

It is significant that Petitioners do not cite *Howe*, *In re Chateaugay*, *Pierce*, *Ryan*, *Awbrey*, or *Alday*. Recognizing these cases would have demolished Petitioners' thesis that the Circuits are splintered into several different approaches.

And the cases Petitioners do cite are falsely described. For example, the Fourth Circuit did not expressly adopt the *Yard-Man* "inference," as Petitioners allege, in *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 62 (4th Cir. 1989). Rather, the *Keffer* panel cited *Yard-Man* for the unexciting proposition that retiree benefits are a permissive, not mandatory, subject of bargaining. And the benefits booklet in *Keffer* unambiguously provided that retirees "shall not have such coverage terminated or reduced . . . so long as the individual remains retired from the Company or receives a Surviving Spouse's benefit, *notwithstanding the expiration of this agreement.*" *Keffer*, 872 F.2d at 63 (emphasis by the Court). This unambiguous lifetime benefits provision is enforceable even under the most rigorous standard, that of *Senn* (Petitioners' exaggerated version) and *Litton Financial Printing*. The Fourth Circuit certainly did not apply the *Yard-Man* inference in *Pierce*, and it certainly did not apply the *Yard-Man* inference in *District 17, UMW v. Allied Corp.*, 735 F.2d 121, 124 (4th Cir. 1984), *on reh'g en banc*, 765 F.2d 412, 417, 421 (1985), or in *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588, 591-592 (4th Cir. 1985), when that Circuit held that con-

tract language identical to the language in this case ("during the term of the agreement") required the employer to provide benefits during the term of the agreement, and no longer.

The First, Third, Eighth, Ninth and Eleventh Circuit decisions Petitioners cite do not help them paint their picture of schism either. The First Circuit decision, *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987), was not even a decision on the merits. Rather, it was an appeal from a preliminary injunction; the issue was whether the district court abused its discretion in balancing the four criteria, and in that case the most important issue was irreparable harm, with likelihood of success of only secondary importance. The Ninth Circuit decision in *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984), applied a traditional contract analysis—just like the Seventh Circuit did in this case—concluded that disputed issues of fact precluded entry of summary judgment in favor of the employer, and reversed the summary judgment. The Eighth Circuit opinion in *Anderson II* did not "approv[e] of the resort to extrinsic evidence where the contract was ambiguous," as Petitioners claim. Pet. 15. Rather, the Court "assume[d]" the district court found the language ambiguous because it did consider extrinsic evidence. 836 F.2d at 1517. Because that court, like this Court, reviews judgments rather than opinions, it affirmed the judgment in favor of the employer. In *Strubbe v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 330-331 (3d Cir. 1984), the Third Circuit ignored *Yard-Man*, held that benefits did not survive expiration of the contract, and affirmed summary judgment for the employer. In *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989), the Eleventh Circuit considered the same unambiguous lifetime-benefits

provision as *Keffer* and, not surprisingly, reached the same result. All of these decisions are more consistent with *Senn* than with *Yard-Man*.

Thus there is no three-way split between the Circuits, such as Petitioners describe. The differences in results, and in resort to extrinsic evidence, result from the different contract language in each case, not from any radical differences in analysis. All of the Circuits, even the Sixth, follow the traditional contract analysis.

But the Sixth Circuit, hobbled by the *Yard-Man* inference, does not follow the traditional path very well. In fact, the Sixth Circuit is even out of step with itself. There seems to be a conflict *within* the Sixth Circuit: sometimes it draws an "inference" that welfare benefits vest upon retirement, as it did in *Yard-Man* and in *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1291 (6th Cir. 1991), and *Smith v. ABS Industries, Inc.*, 890 F.2d 841, 842 (6th Cir. 1989). Sometimes it goes farther and purports to impose an outright presumption that welfare benefits vest upon retirement, and shifts to the defendant employer the risk of non-persuasion—which is what Petitioners plan to urge upon this Court. *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 692 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 616, 617 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986) (recognizing a "strong presumption" of intent to vest retiree benefits). (Note, however, that both *Weimer* and *Policy* concerned express lifetime-benefits provisions, which are enforceable without need of an inference or presumption—even under the rule of *Senn* and *Litton*.) Sometimes the Sixth Circuit disclaims any presumption of vesting. *International Union, UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir. 1984). Sometimes the Sixth Circuit ignores the *Yard-Man* inference entirely, and issues a

mainstream retiree-benefits decision that could have easily have come from the Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth or Eleventh Circuits. *Musto v. American General Life Ins. Co.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). Thus there is no real Sixth Circuit "rule." The Sixth Circuit is more fragmented by itself than the other eleven circuits as a group.

This Court does not sit to resolve *intra*circuit conflicts: that wound must be healed by the Sixth Circuit itself, sitting *en banc*. *Davis v. United States*, 417 U.S. 333, 340, 94 S. Ct. 2298, 2302 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 634 (1957) (per curiam). Even the Sixth Circuit must surely get the message after *Litton Financial Printing*. Once it does, there will be no conflict between circuits.

And if it does not, and if this Court then determines that review of this issue is necessary—then the Court should do what it did in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948 (1989): take a case from the one Circuit that is out of step with all the rest, because it is most likely to be wrong. In *Firestone*, that was the Third Circuit, the only circuit to require *de novo* review of benefit determinations. In this case, the *Yard-Man* inference prevails only in the Sixth Circuit, and only sometimes. If the Sixth Court does not correct its mistake in light of *Litton*, and this Court has to do the job, it should await an appropriate case from the Sixth Circuit.

3. Petitioners exaggerate the "default rule" followed in this case.

Petitioners' effort to paint the *Senn* "default rule" as more horrible than it really is requires them to exaggerate what the Court of Appeals did, and make things up where

exaggeration is not enough—to turn a backyard bush into a moonlight monster.

First, Petitioners exaggerate the "default rule" itself. They describe it as:

> a "default rule," that, in the absence of a clear and express statement in the agreement that the retiree insurance benefits are intended to continue beyond the term of the contract, " 'entitlements established by collective bargaining agreements do not survive [the contract's] expiration or modification.' "

Pet. 13. The last fourteen words of this statement comprise the actual default rule followed by the Court of Appeals. The first thirty-one words are Petitioners' own hyperbole.

Second, Petitioners describe this default rule as the "*Senn* presumption" or as a "conclusive presumption." Pet. 13, 15. It is not a presumption at all. A presumption shifts the burden of going forward with evidence to the party against whom the presumption operates. F.R.E. 301. But the whole point of the *Senn* default rule is that the burden does *not* shift: the burden remains on the plaintiff to prove his case, just like any other contract case.

Third, Petitioners assert that under the "default rule" (or at least their inflated description of it) "only two possibilities are contemplated": either the contract language "clearly and expressly states" that retiree benefits survive contract expiration, in which case no extrinsic evidence will be considered; or the entitlement to benefits will be conclusively presumed to expire with the contract. Pet. 17.

That is a very deceptive statement. That is not what the Court of Appeals did at all. Instead, the Court of Ap-

peals contemplated *four* distinct possibilities. The first possibility was an express vesting provision: that, obviously, was not present, and Petitioners have never claimed it was. Pet. App. 19a-20a. The second possibility was an ambiguity, which could justify resort to extrinsic evidence—and the Court could not find that either. Pet. App. 20a-21a. The third possibility was contractual silence, which the Court refused to equate with ambiguity. Pet. App. 21a. Of course not: under traditional contract principles, silence means "no promise" and the plaintiff loses on the burden of proof. The fourth possibility is an unambiguous provision that benefits do *not* vest. And *that* is what the Court of Appeals found in the record of this case, in the 1986 CBA and 1985 and 1986 SPDs.

There lies exposed the weaknesses in Petitioners' argument: their clouded view of traditional contract law, and the blind eye they turn toward the text of the agreements and SPDs. For the agreements are not silent. Each of them contains an expiration clause which is *not* ambiguous: the terms "This Agreement," the adverb "until" and the date are unambiguous, particularly in light of *Litton*'s lesson on black letter contract law. The express tie between the duration of benefits and the duration of the basic agreement, in the 1986 contract and in the 1985 and 1986 SPDs, is also unambiguous and eliminates any doubt as to whether retiree benefits continue past contract expiration. Even the Sixth Circuit gives effect to an unambiguous termination clause. *Musto*, 861 F.2d at 906.

In fact, both the question as described by Petitioners, and the actual issue of the allocation of the burden of proof, are largely moot given the actual record in this case. Regardless which one of the real or imaginary approaches described by Petitioners a court takes, regardless which side has the burden of proof, in this case the

post-1984 benefit plan contains unambiguous termination clauses. So any disquisition by this Court on the subjects of burden of proof, ambiguity or extrinsic evidence will be merely an advisory opinion. It cannot make a difference in the disposition of this case.

Plaintiffs seek to minimize the importance of the SPDs by relegating them to a footnote, and claiming that "As extrinsic evidence of the meaning of the 1984-86 agreement, PST introduced an insurance agreement purporting to describe the benefits negotiated in that agreement." Pet. 7 n.6. This statement is wrong in two respects. First, PST did not introduce the SPDs: they were Plaintiffs' Trial Exhibits 10 and 11. Second, they were not "extrinsic evidence" at all, but "part of the contract" according to Plaintiffs' opening statement and closing argument (Trial Tr. 5, 6; R. 82, Last-day Tr. 39), and "incorporated into it [i.e., the collective bargaining agreement] by reference" according to the jury instructions (R. 82, Last-day Tr. 24).[4] The Court of Appeals agreed with Petitioners that because the insurance books and SPDs "were explicitly incorporated into each of the collective bargaining agreements, they constitute part of the contract rather than extrinsic evidence." Pet. App. 19a n.9. This Court does not decide issues which were not raised or litigated in the lower courts, and will not entertain an argument that seeks reversal based on stipulations or jury instructions that the petitioner himself requested. *City of Springfield v. Kibbe*, 480 U.S. 257, 259, 107 S. Ct. 1114, 1115 (1987) (per curiam). Thus Petitioners are bound by their argu-

[4] This instruction was derived from a stipulation in chambers that all the insurance books and SPDs were incorporated into the collective bargaining agreements. Plaintiffs obviously did not object to this instruction.

ments and stipulations in the trial court that the SPDs are an essential part of the contract.[5]

Petitioners want to turn this Court into a trial court. They want to try a different case, with a different record and different arguments, than the case they tried in Milwaukee in December 1989 and argued before the Seventh Circuit in April 1991. That is not surprising, for this Court's decision in *Litton* in June 1991 destroyed their original arguments. But this Court is not a trial court.

4. The "low threshold" for extrinsic evidence.

As a secondary argument, Petitioners claim there is a conflict between the traditional "default rule" followed in *Senn*, *Litton* and all of the States and Circuits, and a number of decisions in another context which hold that extrinsic evidence is uniquely appropriate in construing collective bargaining agreements.

First, this argument is another one that is not properly before the Court, because Plaintiffs failed to raise it in the District Court or Court of Appeals. In the District Court, both in their motion for summary judgment and in discussions in chambers about jury instructions and

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[5] The statement in footnote 6 of the Petition that the 1985 and 1986 SPDs were unilaterally prepared by the Company, and the implication that they somehow are of less effect, is a variation of the same argument that the SPDs are not part of the contract. Again, this argument is precluded by Petitioners' argument and stipulations at trial. Of course the Company prepared the SPDs unilaterally: ERISA requires plan administrators to prepare and distribute them. ERISA § 101, 29 U.S.C. § 1021. It is significant that the union never filed a grievance, the insurance committee never complained, and when the 1986 contract was negotiated it contained the same explicit tie between retiree health benefits and the duration of the agreement that had earlier appeared in the 1985 SPD.

the special verdict, they advocated the traditional approach—ambiguity first, determined by the court as a matter of law; then consider extrinsic evidence if permissible—as the District Court acknowledged in explaining its unorthodox decision to submit the legal issue of ambiguity to the jury.[6]

Second, there is no conflict because the two approaches apply to two different problems. The cases cited by Petitioners involve the employment relationship during the term of an agreement, during which the contract must become "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate [and which] covers the whole employment relationship." *Transportation-Communication Employees Union v. Union Pac. R.R.*, 385 U.S. 157, 160-161, 87 S. Ct. 369, 371 (1966), *reh'g denied*, 385 U.S. 1032 (1967). The parties are not only allowed, but required, to fill in blank spots between negotiations, and they often employ arbitrators to do it for them. Several of the cases cited by Petitioners, not surprisingly, involve arbitration. Only one of the cases cited by Petitioners involves welfare benefits or any other ERISA issue.

Congress has decided that pension plans and other benefit plans require different, much more formal treatment. For them Congress enacted a "comprehensive and retieu-

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[6] "The plaintiff and the defendant have both asked me to decide the question of whether or not the individual collective bargaining agreements are ambiguous. And although I don't necessarily disagree with the position that it is a question of law, it should be decided by the Court in the context of this case, I'm going to submit it to the jury. And the jury's verdict on the point may be viewed as merely advisory . . . ." R. 82, Last-day Tr. 3. See also Pet. App. 50a-55a; R. 39, 45, Plaintiffs' briefs in support of motion for summary judgment.

lated" federal law of trusts, called ERISA. *Firestone Tire & Rubber*, 109 S. Ct. at 953-954. That "comprehensive and reticulated statute" includes a statute of frauds, which requires every benefit plan to be in writing. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). Thus "the efficacy of [Petitioners'] claim under ERISA turns solely upon the terms of the written instruments governing the plan." *Ryan*, 877 F.2d at 603; *accord Musto*, 861 F.2d at 910. No reported decision about welfare benefits disagrees with this central holding of *Ryan*, and of the panel decision in this case. No Circuit has any great difficulty distinguishing between the two situations. And Congress also distinguished between the two contexts: it provided easy access to the courts in lieu of arbitration, both because retirees are not members of the bargaining unit and lack recourse to traditional means of dispute resolution, and because arbitrators possess expertise in "the law of the shop, not the law of the land," and possess no special expertise in the administration of trusts. *Anderson v. Alpha Portland Industries, Inc.* ("*Anderson I*"), 752 F.2d 1293, 1300 (8th Cir.) (en banc), *cert. denied*, 471 U.S. 1102 (1985). The need for judicial expertise, and to spell out obligations in black and white, is critical when dealing in lifetime obligations for large classes of employees, where one wrong decision can easily put an employer out of business.

Third, the issue is not fairly presented by the record in this case. There was no evidence of an actual agreement, or of any oral representation, that benefits would continue forever. The "extrinsic evidence" is not really evidence at all, just the subjective beliefs of the Plaintiffs. If the courts allowed this into evidence, then neither the rights of beneficiaries nor the obligations of sponsors

and trustees would ever become fixed by written instruments, as Congress mandated. Every claim would come down to a swearing contest and jury nullification of carefully-drafted, unambiguous benefit plan documents—just as it happened in this case.

III.

THIS COURT SHOULD NOT HOLD THE PETITION PENDING THE SEVENTH CIRCUIT'S RESOLUTION OF *BIDLACK v. WHEELABRATOR CORP.*

Petitioners filed a Supplemental Brief which asked this Court to hold the Petition until the Seventh Circuit Court of Appeals decides *Bidlack v. Wheelabrator Corp.*, No. 91-2378, in banc, and then either grant the Petition or remand the case to the Seventh Circuit for reconsideration in light of *Bidlack*.

This Court should do no such thing. First, this Court has no jurisdiction to consider the Petition because the case is not "in" the Court of Appeals. Even if the Seventh Circuit recalls its mandate, that will not cure the problem, for the question whether a case is "in" the Court of Appeals is determined as of the date and hour of the filing of the Petition in this Court. *United States v. Nixon*, 418 U.S. at 689, 94 S. Ct. at 3098.

Second, it is unlikely the Seventh Circuit will either recall its mandate in *Senn* or overrule the *Senn* "default rule" in *Bidlack*, because the *Senn* default rule prevails in almost every Circuit. Moreover, there is a significant difference between this case and *Bidlack*: the records, and particularly the plan language involved. The same Court of Appeals that ordered consideration in banc on the record presented in *Bidlack*, found it unwarranted on the record of this case. That probably has something to do

with the unambiguous termination clauses in the SPDs, and the explicit duration-of-benefits provision in the 1986 contract, which required judgment for the employer in this case regardless who has the burden of proof.

Third, the Petition should be judged on its own merits. There is no clear conflict between the Circuits now, and this case does not satisfy the criteria for review by this Court.

Fourth, Petitioners suggest that this Court should grant certiorari and remand the case for reconsideration in light of *Bidlack*, citing *Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991). But there is no comparison between *Brown Group* and this case. First, both *Brown Group* and *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990), *on reh'g en banc*, 935 F.2d 947 (1991), involved diametrically opposite rulings on a pure issue of law—the continuing viability of a particular cause of action, in light of a new decision from this Court—and could not be reconciled. Second, *Brown Group* was clearly inconsistent both with this Court's new decision and with the weight of authority in other Circuits, *Taggart*, 915 F.2d at 397, and the Eighth Circuit was likely to adopt the opposite view in *Taggart*. In this case, however, it is extremely unlikely the Seventh Circuit will overrule *Senn*. And even if it does, *Senn* and *Bidlack* can be reconciled on the basis of their different records, and the unambiguous termination clause in this case.

Petitioners' Supplemental Brief offers the Court no reason to hold the Petition in this case pending the Seventh Circuit decision in *Bidlack* or to remand this case to the Seventh Circuit. The Court should deny the Petition forthwith.

CONCLUSION

Petitioners seek relief in the wrong forum. This Court is not a trial court. This Court does not sit to resolve conflicts within a single Circuit. And most importantly, this Court is not the Congress.

For it is to Congress the Plaintiffs must turn for relief, as Senior District Judge Will recognized in his trenchant concurrence in the Court of Appeals. The issue of retiree health benefits is important, but its importance in this election year is political, not legal. The courts are doing their job: analyzing welfare benefit plans under traditional contract principles; enforcing agreements to provide benefits for life, where such agreements were actually made, as in *Policy* and *Keffer*; and refusing to legislate lifetime benefits where the parties never agreed to them.

Respondents pray the Court to DENY the Petition for Writ of Certiorari.

Respectfully submitted,

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September 4, 1992

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

DATE: May 13, 1992

TO: Sofron B. Nedilsky
United States District Court
Eastern District of Wisconsin
Room 362
517 E. Wisconsin Avenue
U.S. Courthouse & Federal Building
Milwaukee, WI 53202

FROM: Thomas F. Strubbe, Clerk

RE: 90-3100
Senn, Norman v. United Dominion Ind
87 C 1353, Judge Terence T. Evans

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

[ ] No record filed
[×] Original record on appeal consisting of:

ENCLOSED:		TO BE RETURNED AT LATER DATE:
[2]	Volumes of pleadings	[ ]
[11]	Loose pleadings	[ ]
[8]	Volumes of transcripts	[ ]

[7]	Charts of exhibits	[ ]
[ ]	Volumes of depositions	[ ]
[ ]	In Camera material	[ ]
[1]	Folder of exhibits	[ ]

Record being retained for use in Appeal No. _____ [ ]

Copies of this notice sent to: Counsel of record

[ ] United States Marshall
[ ] United States Probation Office

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date: _____ _____

Deputy Clerk, U.S. District Court

(1071-010891)